


January 11, 2019

FOR YOUR INFORMATION

To: Mayor and Members of Council

From: Patrick A. Duhaney, City Manager 

Subject: Revisions to Administrative Regulation 25 (Non-Discrimination)

This memorandum provides an update on changes made to Administrative Regulation 25: Non-Discrimination and Sexual Harassment (AR25). These recent changes were made to ensure that the policy is not only strong and fair, but also considers the context of the behavior. Finally, these changes were made to ensure that the policy is enforceable and defensible when legal challenges arise.

The changes to AR25 are relevant in light of two recent instances of City of Cincinnati employees using racial slurs while on duty. As stated previously, this type of language and behavior is unacceptable and inconsistent with the standard of conduct expected of City staff.

As City employees, our actions and words represent the City of Cincinnati. It is imperative that we hold ourselves and our employees to a high standard of professional conduct.

Below you will find additional details related to the amendments made to Administrative Regulation 25.

Changes to AR25

In August 2018, the City's Law Department worked with the City Manager's Office and the Department of Human Resources to make substantial changes to AR25, including adding a section that covers violations and associated penalties. The addition of this section to the regulation now provides specifically defined penalties for violations, which include a minimum 40-hour suspension for a first offense and required completion of the AR25 training course and dismissal for a second violation. The previous version of the regulation stated only that "Failure to adhere to this policy may result in corrective action up to and including termination."

In making these changes, the Administration sought to align the penalties for violating this regulation with the established penalties for violating City Administrative Regulation 52 (AR52), the City's substance abuse regulation. AR52 also calls for a minimum 40-hour suspension on the first incident and termination on the second offense. Importantly, all classified employees may hear and respond to disciplinary charges in a hearing before any penalty is finalized.

The Administration believes it is important to strengthen the penalties for violations of AR25. However, when determining the penalties for violating AR25, the City must balance punishment and deterrence against the likelihood of a successful appeal to the Civil Service Commission (for classified employees), an arbitrator (for employees represented by a union), or in the instant case, Peer Review (for FOP members).

“Zero Tolerance” Discipline

First, it is good to clarify what is meant by “zero tolerance.” Generally, zero tolerance discipline imposes strict punishments to eliminate undesirable conduct. It also eliminates the ability for management to exercise discretion or change punishments to fit different circumstances. With zero tolerance discipline, management cannot change the pre-determined penalty regardless of individual culpability, extenuating circumstances, or history. While the hope is that use of zero tolerance discipline will eliminate violations of AR25 by imposing harsh penalties for first time offenders, there are risks in an environment governed by union contracts and civil service law.

The majority of City of Cincinnati employees are protected by civil service, a union contract, or both. The civil service system and union contracts provide “just cause” protection to employees. Therefore, any employee disciplined under “zero tolerance” would be entitled to appeal to the Civil Service Commission, arbitration or another contractually negotiated venue. Arbitrators and other decisionmakers tend to scrutinize zero tolerance discipline with care because it may fail to consider all the information that is normally relevant to the termination of an employee under a just-cause analysis. Some arbitrators emphasize that a “just cause” decision is not limited to determining if the employee violated the rule, but also consideration of the employee’s work history, equitable application of the rule, degree of culpability, or other factors that come into play in most discharge cases. As a result, terminations under zero tolerance discipline for violation of AR25 could result in a high number of reversals on appeal, subjecting the City to rehiring the employee in question, back pay and other remedies owed to employees.

Conclusion

The outlined penalties are intended to be a tough but fair change to the City regulation that governs these incidents. Accordingly, the current discipline structure is designed to be enforceable, correct behavior, deter future violations of the City’s regulation, and unequivocally send the message that these incidents are not acceptable.

The City Administration is committed to ensuring its policies and regulations are legally sound, fairly enforced, encourage proper behavior by City employees, and sufficiently representative of the City of Cincinnati.

cc: Paula Boggs Muething, City Solicitor
Chief Eliot Isaac, Cincinnati Police Department
Joe Wilson, Director, Human Resources